REMARKS

By this amendment, claims 1-26 are pending, in which claim 19 is canceled without prejudice or disclaimer, and claims 1, 9, 14, 20, 22 and 23 are currently amended. No new matter is introduced.

The Office Action mailed March 19, 2004 rejected claims 1-3, 5, 7, 9-12, 14 and 22-25 under 35 U.S.C. § 103 as obvious based on *Pogrebinsky* (US 6,445,661) in view of *Schuster et al.* (US 6,512,761). Claims 4, 8, 12, 15 and 21 as obvious under 35 U.S.C. § 103 based on *Progrebinsky* in view of *Schuster et al.* and *Casey* (US 6,493,349). Additionally, claim 1 is objected to for informalities.

Claims 19 and 20 were objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form.

Applicants appreciate the indication that claim 26 is allowed.

In view of the claim amendment, the objection to claim 1 is rendered moot.

Independent claim 14 has been amended to incorporate the allowable subject matter of dependent claim 19 (now canceled), and thus, claim 14 and claims 15-21 depending therefrom are allowable.

To advance prosecution, Applicants have amended claims 1, 9, 22, and 23. Independent claim 1, as amended, recites "a routing engine forwarding a **data packet including user data** to a destination node of a communications network, wherein the data packet traverses a particular connectionless communication path among a plurality of connectionless communication paths to the destination node; and a probe mechanism generating and sending a probe message over the particular connectionless communication path traversed by the data packet for determination of statistics of the communications network with respect to the data packet." Amended claim 9 recites "generating a probe message to determine performance statistics relating to transmission

of a **data packet including user data** over a connectionless communication path; and sending said probe message over the connectionless communication path among a plurality of connectionless communication paths to a destination node that is reachable by any one of the plurality of connectionless communication paths. Amended claim 22 recites "means for routing **data packets including user data** to a destination router reachable over a plurality of connectionless communication paths within a virtual private network; and means for generating and sending a probe message over one of the plurality of connectionless communication paths to the destination router to determine delay experienced by the data packets, the one connectionless communication path transporting the data packets." Independent claim 23 recites "generating a probe message for determining propagation time associated with transmission of a **data packet including user data** to a predetermined location; and sending said probe message over a connectionless communication path that transports the data packet among a plurality of connectionless communication paths of a network, wherein the predetermined location is reachable via any one of the plurality of connectionless communication paths, wherein the propagation time is measured based on a reply message to the probe message.

By contrast, *Progrebinsky* operates by transmitting probe packets, P1-P3, (shown in FIG. 6) to compute relative one way delay (ROWD): ROWD1, ROWD2, and ROWD3. These probe packets are not "data packets including user data," as positively claimed. Accordingly, *Progrebinsky* is deficient, at least, in this regard.

Applicants submit that the addition of *Shuster et al.* and *Casey* fails to fill in the gaps of *Progrebinsky*. *Shuster et al.* discloses a system for adjusting billing for real-time media transmission based on delay and is applied for a supposed teaching that the connectionless path for the probe message is a particular communication path traversed by the packet. *Casey* (per Abstract) is directed to a method to partitioning shared network infrastructure into multiple

distinct virtual private network areas and connecting a virtual router between at least two of the areas.

Furthermore, Applicants contend that the suggested combination of *Progrebinsky* and *Shuster et al.* is suspect, in that *Progrebinsky* teaches away the proposed combination and the claimed invention. As explained in Applicants' Response dated Dec. 30, 2003, the values for ROWD1, ROWD2, and ROWD3 (enumerated in col. 4: 25-27) are different in the *Progrebinsky* system, and thus, suggests that **different paths** have been taken for each of the probe packets, P1, P2, and P3 because clock differences have been removed from the computation of ROWD1, ROWD2, and ROWD3.

Further, it is well settled that it is impermissible simply to engage in hindsight reconstruction of the claimed invention, using Applicant's structure as a template and selecting elements from the references to fill in the gaps. *In re Gorman*, 933 F.2d 982, 18 USPQ2d 1885 (Fed. Cir. 1991). Recognizing, after the fact, that a modification of the prior art would provide an improvement or advantage, without suggestion thereof by the prior art, rather than dictating a conclusion of obviousness, is an indication of improper application of hindsight considerations. Simplicity and hindsight are not proper criteria for resolving obviousness. *In re Warner*, 397 F.2d 1011, 154 USPQ 173 (CCPA 1967). The Office Action, in this instance, simply draws the conclusion (on page 4) that the modification of the *Progrebinsky* system is motivated by a need to "improve the quality of communication." The reliance on this broad motivation evinces a lack of factual support in the references themselves for the proposed combination.

In view of the foregoing, Applicants respectfully request the withdrawal of the obviousness rejections.

Therefore, the present application, as amended, overcomes the objections and rejections of record and is in condition for allowance. Favorable consideration is respectfully requested. If

any unresolved issues remain, it is respectfully requested that the Examiner telephone the

undersigned attorney at (703) 425-8508 so that such issues may be resolved as expeditiously as

possible.

Respectfully Submitted,

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